(1)
Supreme Court, U.S.
FILED
001232 JAN 29 2001
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

RICARDO A. SANDOVAL,

Petitioner,

v.

ROBERT RUBIN, Secretary of the United States Department of the Treasury, in his official capacity, and as agency head,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID L. ROSS
Counsel of Record
ROSS, ROSE & HAMMILL, LLP
Attorneys for Petitioner
8383 Wilshire Boulevard
Suite 634
Beverly Hills, CA 90211
(323) 653-7724

164930

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

72pp

QUESTION PRESENTED

Whether a prevailing Title VII plaintiff in a district court in one state may be denied his reasonable attorney's fees for services performed by admitted attorneys solely because they are employed by an interstate law firm that is owned by a non-admitted attorney licensed in another state?

PARTIES TO THE PROCEEDING

Petitioner, Ricardo A. Sandoval, was Plaintiff in the District Court and Appellant/Cross-Appellee in the Court of Appeals, Ninth Circuit. Petitioner was represented in the District Court by David G. Spivak, Esq., Peter Szabadi, Esq., and Wendy Jan, Esq., of the Law Offices of David L. Ross. Respondent was represented by Peter J. Sholl, Assistant United States Attorney and Ray T. Lee, III, Special Assistant United States Attorney.

In the United States Court of Appeals, Ninth Circuit, Petitioner was represented by David L. Ross, Esq., and David G. Spivak, Esq., of the Law Offices of Ross, Rose & Hammill, LLP, and Peter Szabadi, Esq. Respondent was represented by Peter J. Sholl, Assistant United States Attorneys.

Undersigned counsel was counsel for Petitioner in the United States Court of Appeals, Ninth Circuit.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
A. Jurisdiction of the District Court	2
B. Background	2
C. District Court's Denial of Petitioner's Motion for Attorney's Fees	3
i. Denial of Attorney's Fees Based Upon Not Admitted Counsel	3
D. The Ninth Circuit's Opinion	5

Contents

	Page
Reasons For Granting The Writ	6
The Decisions Below Are In Conflict With Established Precedent of This Court And The Circuit Court's Opinion Decides An Important Question of Federal Law Which Has Not Been Settled By This Court	6
A. Attorney's Fees and Civil Rights' Actions ...	6
1. "Special Circumstances" and the Denial of Attorney's Fees	7
2. Courts' Denial of Attorney's Fees Was An Impermissible Sanction	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988) 7, 9, 10, 11

Ackerley Communications, Inc. v. City of Salem, 752 F.2d 1394 (9th Cir. 1985) *cert. denied*, 105 S. Ct. 3503 9

Amy J v. Timberlane Regional School District, 2000 WL 1513769 (D.N.H. 2000) 12

Birbrower, et al. v. Superior Court of Santa Clara County, 17 Cal. 4th 119 (1998) 12

Chastang v. Flynn and Emirch Co., 541 F.2d 1040 (4th Cir. 1976) 10

Christiansburg Garmet Co. v. EEOC, 98 S.Ct. 694 (1978) 8

Doe v. Board of Education, Baltimore County, 165 F.3D 260 (4th Cir. 1998) 7

Erickson v. Board of Education, Baltimore County, 162 F.3d 289 (4th Cir. 1998) 7

Estate of Condon v. McHenry, 76 Cal. Rptr. 2d 922 (Cal. 1998) 12

Cited Authorities

	Page
Hatfield v. Hayes, 877 F.2d 717 (8th Cir. 1988)	8, 9
Hensley v. Eckerhart, 103 S.Ct. 1933 (1983)	7
J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985)	8
Kirchberg v. Feenstra, 708 F.2d 911 (5th Cir. 1983)	10
Lester Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal. App. 2d 572 (Cal. 1950) ...	12
Love v. Mayor, City of Cheyenne, 620 F.2d 235 (10th Cir. 1980)	8
Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) ...	8, 10
McLean v. Arkansas Bd. of Education, 723 F.2d 45 (8th Cir. 1983)	9
Morscott, Inc. v. City of Cleveland, 936 F.2d 271 (6th Cir. 1991)	10
Newman v. Piggie Park Enterprises, 88 S. Ct. 964 (1968)	6, 8
Northcross v. Memphis Bd. of Education, 93 S. Ct. 2201 (1973)	8

Cited Authorities

Page

Seattle School District v. State of Washington, 633 F.2d 1338 (9th Cir. 1980) aff'd, 102 S. Ct. 3187 ..... 8, 9, 11

Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979) 9

Society of Professional Journalists v. Briggs, 687 F. Supp. 1521 (D.Utah 1988) 10

Stefan v. Laurenitis, 899 F.2d 363 (1st Cir. 1989) .. 10

Teitelbaum v. Sorenson, 648 F.2d 1248 (9th Cir. 1981) 10

Toussaint v. McCarthy, 826 F.2d 901 (9th Cir. 1987) 10

United States v. Stoneberger, 805 F.2d 1391 (9th Cir. 1986) 11

United States v. Summet, 862 F.2d 784 (9th Cir. 1988) 11

Webb v. Aggrey, 481 F. Supp. 651 (N.D.Ohio 1979) 10

Wheatley v. Ford, 679 F.2d 1037 (2nd Cir. 1982) ... 8

Z.A. v. San Bruno Park School Dist., 165 F.3d 1273 (9th Cir. 1999) 12

Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989) 11, 12

Cited Authorities

Page

Statutes:

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(4) 2

42 U.S.C. § 2000e-16 1

42 U.S.C. § 2000e-5(k) 1, 2, 6

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e 1

Rule:

Federal Rule of Civil Procedure 54(d) 1, 2

Other Authority:

H.R. Rep. No. 94-1558 (1976) 7

TABLE OF APPENDICES

Page

Appendix A — Amended Memorandum Of The United States Court Of Appeals For The Ninth Circuit Dated And Decided October 31, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of California Denying Plaintiff's Motion For Attorneys' Fees Dated And Filed October 6, 1998 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed October 30, 2000 ..... 41a

Appendix D — Judgment Of The Superior Court Of California In And For The County Of Los Angeles In *The State Bar Of California V. David L. Ross, Et Al.*, Case No. Bc150846 Dated And Filed January 7, 1997 ..... 43a

Petitioner, Ricardo A. Sandoval, hereby petitions this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the District Court's Order denying a successful Title VII (of the Civil Rights Act of 1964, as amended) plaintiff's Motion for Attorney's Fees.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit appears in Petitioner's Appendix (hereinafter cited to as "Pet.App.at 1a") at 1 and was not reported. The Ninth Circuit affirmed an Order of the District Court for the Southern District of California (Pet.App. at 7a) denying a successful Title VII plaintiff's Motion for an award of attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, 42 U.S.C. § 2000e-5(k), and Rule 54(d), Federal Rules of Civil Procedure.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals, Ninth Circuit, was entered on October 30, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In the District Court for Southern District of California, Petitioner filed suit pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e, *et seq.*). After a jury verdict in his favor, Petitioner moved the District Court to award him his reasonable attorney's fees pursuant to 42 U.S.C. § 2000e-5(k) and Rule 54(d), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

The jurisdiction of the District Court was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343(a)(4). (Pet.App.at 7a).

B. Background

On June 19, 1995, Petitioner, Ricardo A. Sandoval, filed suit in the United States District Court for the Southern District of California for employment discrimination (national origin discrimination and retaliation) in violation of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §§ 2000e, *et seq*). Petitioner was employed as a United States Customs employee where he alleged he was exposed to a hostile work environment and retaliation.

On May 15, 1998, after ten (10) days of trial and six (6) days of deliberation, a jury returned a verdict in Petitioner's favor. Essentially, the jury found that Petitioner was illegally denied promotions based upon his national origin and awarded him $200,000.00 in compensatory damages.

As the "prevailing party", Petitioner moved the District Court for an award of his reasonable attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-5(k)) and Rule 54(d), Federal Rules of Civil Procedure.

Ultimately, Petitioner sought only those attorney's fees directly related to the services provided by licensed and admitted California lawyers.

C. District Court's Denial of Petitioner's Motion for Attorney's Fees

The District Court denied Petitioner's Motion for Attorney's Fees for services performed by duly licensed and admitted California attorneys based upon that fact that they were employed by an interstate law firm owned by a non-admitted California attorney licensed in Florida.

i. Denial of Attorney's Fees Based Upon Not Admitted Counsel

The District Court denied Petitioner's motion for an award of his reasonable attorney's because the California office of the national law firm, Law Offices of David L. Ross, who represented Petitioner, was owned by an attorney who was neither licensed to practice in the State of California nor admitted to appear before the District Court[1]. The District Court framed the issue as follows:

> . . . whether [Petitioner] is entitled to attorneys' fees given that David L. Ross, [Petitioner's] counsel and assignee of the right to received the attorneys' fees, is not licensed to practice in the State of California or in the Southern District of California.

---

1. It is undisputed that David L. Ross, Esq., is an attorney licensed to practice in Florida.

(Pet.App. at 20a). The District Court found that ". . . in this case, special circumstances exist that militate granting attorneys' fees to [Petitioner]."[2] (Pet.App.at 21a).

Petitioner argued before the District Court that the attorneys who actually tried and won the case on behalf of Petitioner were duly licensed California lawyers admitted to practice before the District Court. Furthermore, Petitioner provided the District Court with a copy of a stipulated judgment between David L. Ross, Esq. and the State Bar for California which states in pertinent part that:

> [David L. Ross, Esq.] may employ attorneys duly licensed by the State of California to engage in the practice of law on behalf of Ross defendants. In addition, [David L. Ross, Esq. is] not restrained by the terms of this Judgment in any manner from the practice of law legally and in accordance with applicable federal and state law, including the practice of administrative law and the practice of law in any federal forum located in the State of California in which [David L. Ross, Esq. is] admitted or [is] duly authorized to practice law.

(Pet.App.at 45a).

The District Court found that David Ross' involvement in the case was "negligible"[3]. (Trial Transcript of Sept. 14, 1998,

---

2. The District Court Judge was clearly insulted by David Ross' firm's involvement in the *Sandoval* case despite the regular practice of partners of large national law firms "supervising" litigation and legal matters in states in which they are not licensed.

3 It is undisputed that Petitioner's trial counsel, David Spivak, Esq., is a duly licensed California lawyer admitted to practice before

(Cont'd)

p. 15, l.3). The District Court found that "Mr. Ross has misled this court and has been improperly practicing law in this jurisdiction." (Pet.App. at 23a). Accordingly, the District Court held that "[g]iven that Mr. Ross is not admitted to practice before this court, he is not entitled to attorneys' fees." (Pet.App.at 24a).

D. The Ninth Circuit's Opinion

On appeal, the United States Court of Appeals, Ninth Circuit, affirmed the District Court's denial of Petitioner's Motion for Attorney's Fees with opinion. The Court found, as it pertains to this issue, that:

> The district court's finding that counsel misrepresented David Ross's status to practice law in the Southern District of California is not clearly erroneous. Because Ross was not admitted to practice before the district court, the court properly concluded that he engaged in the unauthorized practice of law by participating in Sandoval's representation at trial. The unauthorized practice of law and the misrepresentation of an attorney's status certainly create a special circumstance that would render a fee award to Sandoval's counsel unjust. The district court did not abuse its discretion in denying Sandoval attorney's fees.

(Citations in original omitted). (Pet.App.at 5a).

(Cont'd)
the District Court. Spivak was hired by the California branch of the Law Offices of David Ross for the express reason that David Ross could not represent litigants in California state or federal courts.

REASONS FOR GRANTING THE WRIT

The Decisions Below Are In Conflict With Established Precedent of This Court And The Circuit Court's Opinion Decides An Important Question of Federal Law Which Has Not Been Settled By This Court

There are two (2) reasons why this Court should grant this Petition for *Certiorari*. First, the Circuit Court of Appeals' decision conflicts with established precedent of this Court. This Court has consistently held that successful civil rights litigants are entitled to their reasonable attorney's fees. Secondly, the Circuit Court's opinion decided an important question of federal law that has not been, but should be, settled by this Court. This Court should articulate the confines of what are "special circumstances" by which a District Court may *deny* a successful civil rights litigant his reasonable attorney's fees.

A. Attorney's Fees and Civil Rights' Actions

> In any action or proceeding . . . the court in its discretion, may allow the prevailing party . . . a reasonable attorney's fees (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). Unquestionably, Congress intended that civil rights laws ensure "effective access to the judicial process" for persons with civil rights grievances[4].

---

4. In civil rights cases, the plaintiff assumes the role of a " 'private attorney general' vindicating a policy that Congress considered of the highest priority". *Newman v. Piggie Park Enterprises*, 88 S. Ct. 964, 966 (1968).

H.R. Rep. No. 94-1558, p.1 (1976). *See also Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937 (1983)[5]. Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensely*, 103 S. Ct. at 1973, *quoting*, S. Rep. p. 94-1011, p.4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912 (*quoting Newman v. Piggies Enterprises, Inc.*, 88 S. Ct. 964 (1968)).

1. "Special Circumstances" and the Denial of Attorney's Fees

Based upon Congress' overriding desire to effectuate the purposes behind civil rights' laws, a district court's "discretion to deny a fee award to a prevailing party 'has been interpreted very narrowly' ". *Abu-Sahyun v. Palo Alto Unified School District*, 843 F.2d 1250, 1252 (9th Cir. 1988). *Cf. Erickson v. Board of Education of Baltimore County*, 162 F.3d 289 (4th Cir. 1998) (fact that plaintiff is *pro se* is a special circumstance sufficient to deny attorney's fees for violation of civil rights laws). *And see Doe v. Board of Education of Baltimore Co.*, 165 F.3d 260 (4th Cir. 1998).

A district court is to grant a civil rights prevailing party his reasonable attorney's fees unless such award would be unjust under the "special circumstances" of the case. *Abu-Sahyun*, 843 F.2d at 1252[6]. As the civil rights statutes do not include the

---

5. This Court has held that the standards for attorney's fees in civil rights actions are generally the same whether under § 1988, Title II, or Title VII. *Hensely*, 103 S. Ct. at 1939, n.7.

6. The *Abu-Sahyun* court stated that "[w]hether or not 'special circumstances' exist involved an examination of two factors: (1) whether

(Cont'd)

"special circumstances" exception, "this judicially created exception should be narrowly construed." *Hatfield v. Hayes*, 877 F.2d 717, 720 (8th Cir. 1988), *citing*, *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985) (*en banc.*). "[A] strong showing of special circumstances is necessary to support a denial of attorney's fees". *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985). *See also Love v. Mayor, City of Cheyenne*, 620 F.2d 235 (10th Cir. 1980) (good faith is not a special circumstance justifying the denial of attorney's fees); and *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982) (that an action provided a private benefit to a plaintiff rather than a public benefit is not a special circumstance to deny attorney's fees).

This Court has yet to define or establish standards for what are "special circumstances" sufficient to deny a successful civil rights litigant's his reasonable attorney's fees. *See Newman v. Piggie Park Enterprises, Inc.*, 88 S. Ct. 964, 966 (1968); *Christiansburg Garmet Co. v. EEOC*, 98 S. Ct. 694 (1978); and *Northcross v. Memphis Bd. of Education*, 93 S. Ct. 2201 (1973) (*per curiam*) ("successful plaintiff should ordinarily recover an attorney's fees *unless* special circumstances would render such an award *unjust*."). In creating an exception without the aid of definite criteria, this Court's aforementioned decisions have led numerous district and circuit courts to attempt to define and articulate the parameters of "special circumstances" in confused and conflicting ways. The holdings of these cases clearly demonstrate that courts are struggling with the overriding

---

(Cont'd)

awarding fees would further the congressional purpose in enacting [the civil rights statute], and (2) the balance of the equities." 843 F.2d at 1253, citing *Seattle School District v. State of Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 102 S. Ct. 3187.

intent of Congress to encourage the prosecution of civil rights laws with the courts' inherent discretion to manage their cases and courts.

In *Abu-Sahyun*[7], *id.*, the Ninth Circuit held that the district court abused its discretion in denying attorney's fees. There, the parties entered into a settlement agreement which failed to address attorney's fees. After the enactment of the Handicapped Children's Protection Act, Abu-Sahyun petitioned for fees. The district court held that granting fees would be unjust under the "special circumstances" in the case. The Ninth Circuit remanded the case because the statute was retroactive stating that the district court had abused its discretion, finding no special circumstances to deny fees. *See also Sethy v. Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979).

In *McLean v. Arkansas Bd. of Education*, 723 F.2d 45 (8th Cir. 1983), the court held that fund-raising activities by an organization representing a prevailing civil rights plaintiff are irrelevant to the issue of attorney's fees and are not special circumstances sufficient to deny fees. In *Hatfield v. Hayes*, 877 F.2d 717 (8th Cir. 1989) the court held even in an exceptionally acrimonious case, there were no special circumstances to justify a denial of attorney's fees. In *Ackerley Communications, Inc. v. City of Salem*, 752 F.2d 1394 (9th Cir. 1985), *cert. denied*, 105 S. Ct. 3503, the court held that a personal financial interest in a case is not a special circumstance. In *Seattle School District No. 1 v. The State of Washington*, 633 F.2d 1338 (9th Cir. 1980) the court held that the district court abused its discretion in denying

7. *Abu-Sahyun*, *id.*, was cited by the Ninth Circuit in the case *sub judice* in finding that the district court did not abuse its discretion in denying Petitioner, Sandoval's, Motion for Attorney's Fees.

attorney's fees and that the fact the plaintiff was a publicly funded entity was not a special circumstance. *Cf. Chastang v. Flynn and Emirch Co.*, 541 F.2d 1040 (4th Cir. 1976) (an unintentional violation of a civil rights act was a special circumstance substantiating denial of motion for attorney's fees). *And see Toussaint v. McCarthy*, 826 F.2d 901 (9th Cir. 1987) (fact that plaintiffs prevailed on limited basis was not a special circumstance sufficient to deny fees); *Kirchberg v. Feenstra*, 708 F.2d 911 (5th Cir. 1983) (fact that taxpayers will pay attorney's fees and discrimination was in good faith not a special circumstance); *Society of Professional Journalists v. Briggs*, 687 F. Supp. 1521 (D. Utah 1988) (fact that government could not prevent discrimination not special circumstance); *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271 (6th Cir. 1991) (good faith not a special circumstance); *Teitelbaum v. Sorenson*, 648 F.2d 1248 (9th Cir. 1981) (novel claim not a special circumstance); *Stefan v. Laurenitis*, 899 F.2d 363 (1st Cir. 1989) (small amount of award not a special circumstance); *Webb v. Aggrey*, 481 F. Supp. 651 (N.D. Ohio 1979) (that plaintiff publicly funded not a special circumstance); and *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985) (good faith and publicly funded plaintiff are not special circumstances).

In the case *sub judice*, the district court denied Petitioner, Sandoval, his reasonable attorney's fees based only upon the fact that the California office of a national law firm which hired California lawyers to prosecute the case was owned by a non-California lawyer[8]. In upholding the District Court's Order denying Sandoval his attorney's fees, the Ninth Circuit cited *Abu-Sahyun v. Palo Alto Unified School Dist.*,

---

8. This is true even though the California Bar sanctioned and approved of this law firm structure. (Pet.App.3).

823 F.2d 1250 (9th Cir. 1988), a case in which the court held that the district court abused it discretion in denying attorney's fees without applying the two-part test enunciated in *Seattle School Dist. v. State of Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 102 S. Ct. 3187 (1982).

2. Courts' Denial of Attorney's Fees Was An Impermissible Sanction

The district court held that the unauthorized practice of law is a "special circumstance" sufficient to deny a successful civil rights litigant his reasonable attorney's fees.[9] (Pet. App. 1 & 2). The court found that since the California office of a national law firm, which hired duly licensed and admitted California attorneys to litigate the case, was owned by a non-California attorney, the firm could not recover its fees. The Ninth Circuit did not make a finding as to these bases but only decided that there was no abuse of discretion.

There is no dispute that the federal courts may sanction attorneys for violations of local rules. *United States v. Summet*, 862 F.2d 784, 786 (9th Cir. 1988). *See also Zambrano v. City of Tustin*, 885 F.2d 1473, 1477 (9th Cir. 1989). In sanctioning an attorney, the court must make "[a] specific finding of bad faith." *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986). "[S]anctions must be consistent with the Acts of Congress and the rules prescribed by the Supreme Court." *Stoneberger* 885 F.2d at 1480, *quoting*, *Martinez*, 593 F.2d at 993. "There must be a close connection between the sanctionable conduct

---

9. The court ruled this way, although only California admitted counsel examined witnesses, signed all court filings, and argued the case.

and the need to preserve the integrity of the court docket or the sanctity of the federal rules." *Zambrano*, 885 F.2d at 1480. "Finally, any sanction imposed must be proportionate to the offense and commensurate with principles of restraint and dignity inherent in judicial power." *Zambrano*, 885 F.2d at 1480. "This last principle includes a responsibility to consider the usefulness of more moderate penalties before imposing a monetary sanction." *Zambrano*, 885 F.2d at 1480.

Furthermore, there is no dispute that an unlicensed and non-admitted attorney is not entitled to fees for services he performed. *Z.A. v. San Bruno Park School Dist.*, 165 F.3d 1273 (9th Cir. 1999). *And see Lester Hardy v. San Fernando Valley Chamber of Commerce*, 99 Cal. App. 2d 572 (1950) and *Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara County*, 17 Cal. 4th 119 (Cal. 1998). *Cf. Estate of Condon v. McHenry*, 76 Cal. Rptr. 2d 922 (1st DCA 1998) (Out-of-state attorneys did not practice law in California for Colorado citizen who was a co-executor of a California Estate; entitled to attorney's fees) and *Amy J v. Timberlane Regional School District*, 2000 WL 1513769 (Dist. NH 2000) (unlicensed attorney allowed attorney's fees under Individuals with Disabilities Education Act). However, the district and circuit courts abused their discretion when they denied Petitioner's attorney's fees *in toto*, even as to the California licensed lawyers for work performed by them.

The intent of Congress is clear. Successful civil rights litigants should be entitled to receive their reasonable attorney's fees. The District and Circuit Courts' interpretation of this judicially created "special circumstance" exception runs afoul of Congress' intent.

CONCLUSION

Congress intended that the civil rights laws would encourage the prosecution of civil rights violations. To achieve that end, Congress rewards successful litigants their reasonable attorney's fees. The judicially created "special circumstances" exception is to be very narrowly construed. In the case *sub judice*, the district and circuit courts' abused their discretion in denying Petitioner, Sandoval, his reasonable attorney's fees for work performed by his duly licensed and admitted California attorneys. As demonstrated by the numerous citations concerning this exception to the rule, a definite set of criteria is needed when courts exercise their discretion in contravention to Congress' overriding mandate.

Based upon the foregoing, Petitioner, Richardo Sandoval, respectfully requests this Court grant his Petition for *Writ of Certiorari*.

Respectfully submitted,

DAVID L. ROSS
Counsel of Record
ROSS, ROSE & HAMMILL, LLP
Attorneys for Petitioner
8383 Wilshire Boulevard
Suite 634
Beverly Hills, CA 90211
(323) 653-7724

APPENDIX

APPENDIX A — AMENDED MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED OCTOBER 31, 2000

United States Court of Appeals
Ninth Circuit.

RICARDO A. SANDOVAL,

Plaintiff-Appellant,

v.

ROBERT E. RUBIN, Secretary of the United States Treasury, in his official capacity, as agency head,

Defendant-Appellee,

and

WILLIAM ROHDE, in his individual and official capacity as an officer of the United States Service, United States Department of the Treasury; Joel A. Geisner, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury; Charles C. Mantle, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury,

Defendants.

Appendix A

RICARDO A. SANDOVAL,

Plaintiff-Appellee,

v.

ROBERT E. RUBIN, Secretary of the United States Treasury, in his official capacity, as agency head,

Defendant-Appellant,

and

WILLIAM ROHDE, in his individual and official capacity as an officer of the United States Service, United States Department of the Treasury; Joel A. Geisner, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury; Charles C. Mantle, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury,

Defendants.

Nos. 98-56831, 98-56891.
D.C. No. CV-95-00970-JNK.

Argued and Submitted June 7, 2000.
Decided Oct. 31, 2000.

Appeal from the United States District Court for the Southern District of California, Judith N. Keep, Chief District Judge, Presiding.

Appendix A

Before KOZINSKI, T.G. NELSON, and WARDLAW, Circuit Judges.

AMENDED MEMORANDUM*

1. Sandoval presented sufficient evidence that the Secretary discriminated against him by failing to upgrade his position. He was eligible for an upgrade after December 1, 1992; an upgrade was available for his position until January 8, 1993; and all other employees in similar positions were classified at the upgraded level. Because a moratorium on upgrades only took effect on January 8, it did not dispel the inference of discriminatory treatment prior to that date.

Additionally, Sandoval showed that similarly situated employees received supervisory assignments and participated in the rotation program. The Secretary offered legitimate nondiscriminatory reasons to explain this difference in treatment, but Sandoval presented evidence that permitted a strong inference of pretext. See Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir.1995); Mangold v. California Pub. Util. Comm'n, 67 F.3d 1470, 1477 (9th Cir.1995). Viewed in the light most favorable to Sandoval, the evidence supports the jury's verdict and the district court did not err in denying judgment as a matter of law to the Secretary on Sandoval's discrimination claims. See Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir.1997), cert. denied, 525 U.S. 812 (1998).

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2. Sandoval also established a case of retaliation under Title VII for the Secretary's failure to select him for supervisory assignments and the rotation program. See EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012 (9th Cir.1983) (retaliation claim requires involvement in a protected activity, an adverse employment decision and a causal connection between the two). Sandoval filed an EEO complaint, which is a protected activity. See id. at 1013. Retaliation could be inferred because his supervisors knew about Sandoval's EEO complaint and subjected him to adverse employment actions within a reasonable time thereafter. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir.1987). Even though the Secretary presented alternative reasons for his actions, evidence based on timing and his supervisors' awareness of Sandoval's protected activity was sufficient to let the issue go to the jury. See Passantino v. Johnson & Johnson Consumer Prods., Inc., No. 97-36191, 2000 WL 562037, at *9 (9th Cir. Apr. 27, 2000).

3. Sandoval failed to make out a prima facie case of retaliation for his upgrade claim. The Secretary's refusal to upgrade his position could only be considered an adverse employment action during the time Sandoval was eligible for an available upgrade, which, as discussed above, was at most from December 1, 1992, to January 8, 1993. But this window of opportunity closed months before Sandoval filed an EEO complaint; it therefore does not give rise to the requisite inference of causation. See Yartzoff, 809 F.2d at 1375. Moreover, Sandoval was not engaging in protected activity when he defied his supervisors by referring the Lakes investigation to the United States Attorney. See O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763-764

(9th Cir.1996). Thus, the evidence does not support a retaliation verdict in favor of Sandoval on his upgrade claim, and the district court erred in denying the Secretary judgment as a matter of law as to this claim. See Omega Envtl., 127 F.3d at 1161.

4. The district court did not abuse its discretion in denying the Secretary's motion for a new trial, because it could reasonably have concluded that the misconduct of Sandoval's attorney did not permeate the trial. See Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1107-08 (9th Cir.1991). Moreover, there is no indication that the jury was influenced by passion and prejudice in arriving at its verdict. See id. at 1107.

5. The district court's finding that counsel misrepresented David Ross's status to practice law in the Southern District of California is not clearly erroneous. Because Ross was not admitted to practice before the district court, the court properly concluded that he engaged in the unauthorized practice of law by participating in Sandoval's representation at trial. See S.D. Cal. Civ. L.R. 83.3 (requiring that counsel be licensed in California or admitted pro hac vice to appear before the district court); cf. In re Poole, 222 F.3d 618 (9th Cir.2000) (bankruptcy attorney properly admitted under local rules to practice in the relevant federal district court is eligible to receive compensation under the federal bankruptcy code, even though he is not a member of the state bar). The unauthorized practice of law and the misrepresentation of an attorney's status certainly create a special circumstance that would render a fee award to Sandoval's counsel unjust. See Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273, 1276

(9th Cir.1999). The district court did not abuse its discretion in denying Sandoval attorneys' fees. See Abu-Sahyun v. Palo Alto Unified Sch. Dist ., 843 F.2d 1250, 1252 (9th Cir.1988). Because the fee award was denied on account of attorney misconduct and through no fault of the client, counsel may recover no attorneys' fees from Sandoval. The district court shall incorporate our ruling on this point into its final judgment.

We therefore

AFFIRM the judgment as to Sandoval's discrimination claims; as to Sandoval's claims of retaliation with respect to supervisory assignment and rotation; and as to attorneys' fees, except that we order the attorneys' fees judgment modified to provide that Sandoval's attorneys may not recover fees from their client; and

REVERSE the denial of judgment as a matter of law on Sandoval's claim of retaliation with respect to the upgrade, and order the judgment modified accordingly.

Each party shall bear its own costs on appeal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA DENYING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES DATED AND FILED OCTOBER 6, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 95-CV-0970-K (AJB)

RICARDO S. SANDOVAL,

Plaintiff,

v.

ROBERT E. RUBIN, Secretary of the United States Department of the Treasury, in his official capacity and as agency head,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000e, *et seq.*

I. *PROCEDURAL HISTORY*

On June 19, 1995, plaintiff filed a Complaint against defendant. Plaintiff filed a First Amended Complaint on May 10, 1996, and a Second Amended Complaint on November 25, 1997. Plaintiff averred that defendant Rubin engaged in employment discrimination, in the form of national origin

discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; specifically, in the Second Amended Complaint, plaintiff alleged the following causes of action: 1) discrimination in the terms and conditions of his employment; 2) unequal treatment in hiring and work assignments; and 3) a hostile work environment.

On April 28, 1998, the court empaneled a jury, and the trial began. On May 15, 1998, after ten (10) days of trial and six (6) days of jury deliberation, the jury returned a verdict in favor of plaintiff. The jury found that, based on national origin discrimination and retaliation, plaintiff was denied a promotion from a grade 13 to a grade 14, denied participation in a rotation program between the Customs Service's Office of Internal Affairs and Office of Enforcement, and was denied assignments as "acting" Resident Agent in Charge ("RAC") following his reassignment to Senior Special Agent. The jury awarded plaintiff a total of $200,000 in compensatory damages.

Specifically, the jury awarded plaintiff the following compensatory damages for his claims:

1) The jury awarded plaintiff $45,000 for plaintiff's claim that "his involvement in protected activity in reference to the rock throwing investigation was, more likely than not, a motivating factor in [his] not being promoted from grade 13 to grade 14.";

2) The jury awarded plaintiff $35,000 for plaintiff's claim that "his national origin was,

more likely than not, a motivating factor in [p]laintiff not being promoted from grade 13 to grade 14.";

3) The jury awarded plaintiff $25,000 for plaintiff's claim that "his involvement in protected activity in reference to the rock throwing investigation was, more likely than not, a motivating factor in [his] not being selected for the Internal Affairs/Office of Enforcement rotation program.";

4) The jury awarded plaintiff $25,000 for plaintiff's claim that "his national origin was, more likely than not, a motivating factor in [his] not being selected for the Internal Affairs/Office of Enforcement rotation program.";

5) The jury awarded plaintiff $30,000 for plaintiff's claim that "his having been involved in the rock throwing investigation was, more likely than not, a motivating factor in [his] not receiving temporary acting supervisory assignments.";

6) The jury awarded plaintiff $40,000 for plaintiff's claim that "his national origin was, more likely than not, a motivating factor in plaintiff not receiving temporary acting supervisory assignments."

Appendix B

On June 29, 1998, defendant filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. Alternatively, defendant moved for a new trial pursuant to Federal Rule of Civil Procedure 59. On July 29, 1999, the court denied defendant's motions.

On August 13, 1998, the court ruled that "[p]laintiff shall be retroactively promoted to a grade 14 position including all benefits as a result of such retroactive promotion effective on December 1, 1992" because the jury found that defendant should have promoted plaintiff to a grade 14 position on the date of his eligibility.

Plaintiff moved for the awarding of attorneys' fees and costs pursuant to 42 U.S.C. § 2000c-5(k). He also moved that the court set back pay from December 1, 1992, to February of 1997, and that the court set front pay for the remainder of his employment with the Customs Department until his retirement at age fifty-seven (57). Defendant opposed. The court originally scheduled oral argument on these issues for September 8, 1998, but at the request of defense counsel, the court moved the hearing to September 14, 1998. The court heard oral argument on that date.

On September 29, 1998, the court issued a separate order setting the back pay due to plaintiff and denying plaintiff's motion for an award of front pay. In this order, the court addresses the issue of whether plaintiff is entitled to attorneys' fees pursuant to Title VII given that David L. Ross is not licensed to practice law in the State of California or in this district.

Appendix B

At the September 14, 1998 hearing, the focus was on the issue of whether the court should award attorneys' fees to the Law Offices of David L. Ross given that Mr. Ross is not admitted to practice law in California or in the Southern District of California. The government vigorously opposed, in its opposition brief and orally in court. Defendant's position was that despite the fact that defendant's attorney, David L. Ross, was not licensed in California he was holding himself out to be licensed. The firm address on all pleadings was as follows:

Law Offices of David L. Ross
P.O. Box 18137
Beverly Hills, CA, 90209

Defendant contends that since Mr. Ross resided in California, had his office in California, and used his name as the firm name, he was holding himself out as a licensed attorney in violation of the law. Therefore, defendant argued that the court could not order the payment of fees to an attorney who was violating the law.

In his reply and in oral argument, plaintiff's trial counsel, Mr. Spivak, argued, without citation to authority, that the Law Offices of David L. Ross was a "national" law firm which was properly practicing law in California by employing California lawyers. Mr. Spivak indicated to the court that David L. Ross also had offices in Florida. Trial counsel advised the court it could submit advisory opinions from the California Bar that Mr. Ross' representation was legal. Consequently, the court asked plaintiff to submit to the court any authority or information supporting counsel's

argument that the Law Offices of David L. Ross is a "national" law firm properly practicing law in the State of California. The court also asked for information concerning the amount of attorneys' fees charged during counsel's travel time.

On September 21, 1998, plaintiff submitted its Response to the court's inquiry. However, instead of providing the court with any authority or information to buttress counsel's original argument, plaintiff argued that the California lawyers employed to work on this case are entitled to attorneys' fees because they legitimately used an "out-of-state" law firm name. On September 25, 1998, defendant submitted a Reply to plaintiff's Response. In the Reply, counsel for defendant indicated that they had been unable to confirm that Mr. Ross has an office in Florida. The court notes that when the court received the government's brief, it had its law clerk call Mr. Spivak for an address of Mr. Ross' Florida firm. The court's law clerk had called the Florida Bar Association, which represented that Mr. Ross is a member in good standing but that the only address it has listed for Mr. Ross is the Beverly Hills address. Mr. Spivak had no address or phone number of Mr. Ross' Florida office. Later that day, in a Supplemental Response, plaintiff called defendant's claim that Mr. Ross does not have an office in Florida a "ridiculous accusation." Plaintiff stated that the Law Offices of David L. Ross maintains an office within the law firm of Spencer & Klein at 801 Brickell Avenue, Suite 1901, Miami, Florida 33131.

Finally, on October 2, 1998, at 2:36 p.m., without prior notice to the court, David Ross faxed a letter to this court along with a copy of a final judgment rendered on January 7, 1997, in the Superior Court of the State of California for

the County of Los Angeles in Case No. BC150846, *The State Bar of California v. David L. Ross, individually, and David L. Ross, d.b.a. Law Offices of David L. Ross*. A copy of said letter and judgment are attached to this order as Exhibits A and B, respectively. The body of the cover letter from Mr. Ross reads as follows: "Please find enclosed the Stipulated Judgment of the California Superior Court involving the California State Bar and the Law Offices of David L. Ross. It concerns the manner in which the Law Offices of David L. Ross may operate and specifically addresses some of the issues before this Court." Mr. Ross does not explain why he has waited to the eleventh hour to submit this judgment to the court.

This order concerns plaintiff's request for the setting of attorneys' fees under Title VII given the jury's verdict in this case.

II. *STANDARD FOR DETERMINING ATTORNEYS' FEES*

Plaintiff moves for the setting of attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) and Federal Rule of Civil Procedure 54(d). Both parties agree that plaintiff may be awarded attorneys' fees.

Title 42 U.S.C. § 2000e-5(k) reads as follows:

> (k) Attorney's fee; liability of Commission and United States for costs
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the

> prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

" 'The district court's discretion to award attorney's fees [under applicable statutes] has, however, been narrowly construed and is circumscribed by decisions of the Supreme Court and this circuit.' (*Jordan v. Multnomah County*, 815 F.2d 1258, 1261 (9th Cir. 1987) (citations omitted)]. . . . [T]he district court should 'provide a concise but clear explanation of its reasons for the fee award.' [*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)]." *Cunningham v. County of L.A.*, 879 F.2d 481, 483-84 (9th Cir. 1988), *cert. denied*, 493 U.S. 1035 (1990).

"The Supreme Court has interpreted this endorsement of a flexible standard by adopting a two-part test to channel the district court's exercise of discretion. Under this 'hybrid approach' to the calculation of a reasonable attorney's fee for the prevailing party, courts must first calculate a lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939. Next, the court may increase or reduce the presumptively reasonable lodestar fee, *see Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) (citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)), with reference to the *Johnson/Kerr* factors that have not been subsumed in the lodestar calculation." *Cunningham*, 879 F.2d at 484 (citing *Clark v. City of Los Angeles*, 803 F.2d 987, 990 & n. 3 (9th Cir.1986).

Appendix B

"Several factors are outlined in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct 1726, 48 L.Ed.2d 195 (1976), to provide guidance in arriving at a reasonable attorney's fee. They include: i) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill requisite to perform the legal service properly, 4) the preclusion of other employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the 'undesirability' of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 406 (9th Cir. 1990).

III. *PARTIES' CONTENTIONS*

In his original motion, plaintiff argued that he is entitled to an award of $324,401.00 in attorneys' fees, representing the work of four attorneys (David Spivak, David Ross, Wendy Jan, and Peter Szabadi) for a total of 1732.54 hours. Plaintiff also moved the court for an award of $27,584.77 in expenses. Plaintiff stated that counsel has not received any pay for six years of work on this case. Due in part to the government's contention that David L. Ross is not entitled to attorneys' fees because Mr. Ross is not licensed in California, at the September 14, 1998 hearing, the court asked Mr. Spivak for a copy of the Retainer Agreement. Before serving defendant with a copy of the Retainer Agreement, plaintiff's counsel initially objected orally to divulging the

Agreement to defendant claiming that it was subject to the attorney-client privilege. Upon the court's order, plaintiff subsequently provided defendant with a copy of the Retainer Agreement. The court notes that "the attorney-client privilege ordinarily protects neither a client's identity nor information regarding the fee arrangements reached with that client." *In re Horn*, 976 F.2d 1314, 1317 (9th Cir. 1992); *see also In re Grand Jury Proceedings*, 33 F.3d 1060, 1063 (9th Cir.), *cert. denied sub nom., Goodman v. United States*, 513 U.S. 867 (1994) (" 'Information regarding the fee arrangement is ordinarily not part of the subject matter of the professional consulting and therefore is not privileged communication even though it may evidence wrongdoing by the client.' " (citations omitted)).

Plaintiff's counsel did submit the Retainer Agreement between the Law Offices of David L. Ross and Mr. Sandoval. The Retainer Agreement, dated July 7, 1994, is signed by plaintiff and David L. Ross and sets forth the fee arrangement in this case which reads as follows:

> The rate of fees for legal services rendered by the Firm will be calculated primarily on the basis of the time expended in accordance with the then current hourly rates for the individuals performing the services. While I [David Ross] expect to be performing most of the legal services on your behalf, instances may arise where I seek the expertise of one or more other principals within the Firm or I delegate duties to other individuals who will perform services under my supervision at hourly rates lower than mine. . . . In addition

> to fees, you [Mr. Sandoval] will be charged for our disbursements, costs and expenses. . . . In order to acquire legal representation, *the Client assigns all rights and interests in attorneys' fees under the statute to the Firm* in accordance with the authorization of assignments by the Supreme Court in the case of *Vanegas v. Mitchell*, 495 U.S. 82 (1990). This is being done to make it impossible for the employer (U.S. Customs Service) to seek to deprive the Firm of reasonable attorneys' fees by offering a settlement to the Client that is conditioned upon the waiver of all or part of the right to seek reasonable attorneys' fees.

Retainer Agreement at 1-2 (emphasis added). The Retainer Agreement was signed well before Mr. Spivak and Ms. Jan, the California-licensed attorneys assigned to this case, were admitted to the California Bar.

During oral argument, the court asked Mr. Spivak, one of plaintiff's counsel, what the fee agreement was with Mr. Sandoval. Mr. Spivak indicated that there was no contingency fee arrangement and that plaintiff agreed to bear his own costs and expenses. He also stated the following: "The fee arrangement, Your Honor, was by a retainer agreement, one in which all fees we received as a result of being the prevailing party would go to us pursuant to the Title VII statute on fees." September 14, 1998 Hearing Transcript at 8, Mr. Spivak's answer indicated that the only fees plaintiff's counsel hoped to earn were the attorneys' fees awarded pursuant to 42 U.S.C. § 2000e-5(k). However, after reviewing the Retainer Agreement, it is clear that plaintiff

not only assigned his rights to attorneys' fees to the Law Offices of David L. Ross, but he also agreed to pay David Ross and his employees by hourly fees. This arrangement is different than the one described by Mr. Spivak on September 14, 1998.

Although defendant concedes that plaintiff, as a prevailing party in this case, may be entitled to attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k), defendant argues that the court may not award fees in this instance since Mr. Ross, plaintiff's counsel of record and assignee of plaintiff's right to attorneys' fees, is neither licensed to practice in the State of California nor admitted in the Southern District of California. Defendant further contends that the court may not award any fees to the other attorneys since their services were derivative of David Ross' representation. Defendant characterizes Mr. Spivak and Ms. Jan, who is not admitted to practice in the Southern District, as mere employees of David Ross who are aiding and abetting his improper legal practice in the State of California.

Another counsel representing plaintiff, Mr. Peter Szabadi, is a labor law specialist who is associated with the Law Firm of David L. Ross for the purposes of this case only; Mr. Szabadi is licensed to practice in California, but he has not indicated if he is admitted to practice in the Southern District of California.

Defendant also objects to the estimated hours and rates proposed by plaintiff and argues that the court may exclude those hours which were not reasonably expended because of attorney overstaffing and duplication of effort. Defendant

contends that plaintiff has overstated the billing rates, overcharged for travel time and expenses, and "over-lawyered" by staffing the case with three attorneys at trial. Defendant further lists those items that defendant has determined are unreasonable.[1]

Based on defendant's objections, plaintiff modified his requests in the Reply by excluding any charges for work conducted by Mr. Ross after the administrative hearing stage, charges for work conducted for *Sandoval II* (a related, pending case), charges for the unrelated discovery, and the charges for Allen Bell's deposition. Plaintiff submitted a Summary of Amended Attorney Charges and Expenses that lists the total charges for attorneys' fees as $281,551 plus costs totaling $31,073.

In general plaintiff argues that all of Mr. Ross' associates are entitled to pay for the work they performed given that they are licensed to practice in California and represented Mr. Sandoval in court. Plaintiff contends that Mr. Spivak

---

1. The following is a list of those items defendant claims are unreasonable charges: 1) $8,007 for charges related to other lawsuits such as *Sandoval II*; 2) $4,325.50 for discovery related to non-parties or unidentified individuals; 3) $5,359 for proceedings which never took place or have yet to take place; 3) $75,909 for "puffing," speculation, poor billing judgment, and "over lawyering" such as $11,725 for the five (5) days of jury deliberation; 4) $6,499.73 in unnecessary expert fees; 5) $1,462.50 for costs incurred as a result of the Allen Bell deposition which plaintiff was supposed to pay; 6) $9,328 for unnecessary and unsuccessful legal work; 7) $18,611 for attorney's fees and back pay and front pay motion preparation; and 8) at least $27,584.77 in additional expenses that are not specified and result from inadequate record keeping.

was the counsel of record for the purposes of this case. Plaintiff avers that all of the claimed charges are reasonable and that plaintiff's counsel should not be penalized for having to travel from Los Angeles to San Diego; even so, plaintiff offers to provide the court with the total travel time charged in this matter if the court should determine that travel time should be paid at a lower rate. Furthermore, plaintiff argues, relying on *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated*, 461 U.S. 952 (1983), that it is reasonable and proper to charge for those fees which were incurred for unsuccessful or ultimately unattempted actions, for the staffing of the plaintiff's team given the complexity of the case, and that its billing practices were specific enough to support an award for those fees. In short, plaintiff concedes that some of the original fees and costs estimated were inappropriate but relies on his original assessment of the remaining fees.

IV. *DISCUSSION*

The gravamen of this motion is whether plaintiff is entitled to attorneys' fees given that David L. Ross, plaintiff's counsel and assignee of the right to receive the attorneys' fees, is not licensed to practice in the State of California or in the Southern District of California.

A. *Attorneys' Fees*

As noted previously, plaintiff is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) since he prevailed in his employment discrimination and retaliation case. *See Hashimoto v. Dalton*, 118 F.3d 671, 677 (9th Cir.

1997), *cert. denied*, 118 S.Ct. 1803 (1998) (holding that a party only needs to be partially successful in seeking relief in order to be considered the prevailing party). Under 42 U.S.C. § 2000e-5(k), "a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances." *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417 (1978). The court appreciates the important policy reasons for fee-shifting in Title VII cases given that Congress has appointed plaintiffs as "private attorneys general" in vindicating critical social policies. *See id.* (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

However, in this case, special circumstances exist that militate against granting attorneys' fees to plaintiff. As noted previously, David L. Ross, sole partner of the Law Offices of David L. Ross in Los Angeles, California, is plaintiff's counsel of record and assignee of the right to attorneys' fees pursuant to the Retainer Agreement. Mr. Ross is not licensed to practice law in the State of California nor in the Southern District of California; he is licensed to practice law in the State of Florida, License No. 337110. Though admitted to practice law in Florida, Mr. Ross maintains an office in Los Angeles, California, with the following mailing address and telephone number: P.O. Box 18137, Beverly Hills, CA 90209; (213) 653-7724. The Florida Bar Association lists this as its only address for Mr. Ross. Mr. Ross is not eligible to appear on a *pro hac vice* basis because he resides in California and maintains an office in California. *See* Local Rule 83.3(c)(5). Instead, Mr. Ross employs attorneys admitted to practice in the State of California, including David Spivak and Wendy Jan, who make court appearances and submit filings on behalf of his clients.

Appendix B

In this case, Mr. Ross served as a supervisor in his client's case. In his initial Declaration submitted in support of plaintiff's Motion for Attorneys' Fees, Mr. Ross stated the following under penalty of perjury:

> 1. I am the attorney of record for the Plaintiff in this action and I have personal knowledge of the contents of this Declaration. . . .
>
> 2. My law firm has been the attorneys of record for the plaintiff Ricardo A. Sandoval in this action. . . .
>
> 17. I eliminated most of the hours I have spent in supervising and assisting the eventual trial counsel David Spivak, Esq. in 1997 although a substantial number of hours were spent in these activities. Most of the charged billable hours represent my assistance in the preparation of trial and attending trial, organizing the presentation of evidence and witnesses, otherwise aiding in the trial of this matter and opposing defendant's post-trial motions. Based on the complexity and significance of this case the assignment of two trial counsel was necessary. . . .

Ross Declaration at ¶¶ 1-2 & 17. In this Declaration, Mr. Ross clearly admits that he is the counsel of record and served as a trial counsel, helping Mr. Spivak organize plaintiff's case.

In addition, from plaintiffs counsel's representations to this court, it was clear that all the attorneys involved in

plaintiff's trial were employed at the Law Offices of David L. Ross in Beverly Hills, California.[2] Though Mr. Spivak was the lead counsel in this case, Mr. Ross and Mr. Spivak gave the court every indication that Mr. Ross was admitted to practice law in this court during the trial. Early on, Mr. Spivak introduced him to the court as the David L. Ross whose name is used in the firm's name. He sat at counsel's table throughout the trial, attended *in camera* sessions, and participated at side-bars along with Mr. Spivak on behalf of his client. When asked by the court on several occasions whether he would handle court sessions until Mr. Spivak arrived, Mr. Ross declined giving such reasons as that Mr. Spivak was the one prepared on the specific issue. Both Mr. Ross and Mr. Spivak failed to inform the court that Mr. Ross was not allowed to practice law in this court. The court relied on Mr. Ross' implicit representations that he was a duly admitted attorney in this jurisdiction and assumed he was supervising Mr. Spivak in this, Mr. Spivak's first trial. In fact, the court asked Mr. Ross several times to assist the court by trying to get Mr. Spivak to comply with the court's rulings.

Thus, Mr. Ross has misled this court and has been improperly practicing law in this jurisdiction. *See Russell v. Dopp*, 36 Cal.App.4th 765, 777 (1995) ("the representation of a client by an unlicensed person in court is a fraud on the court."). Consequently, he has violated Local Rule 83.3(b) which holds that "[o]nly a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order."

---

2. Mr. Peter Szabadi, Esq., was not a trial counsel. He apparently was hired as a consultant whose only appearance was to argue plaintiff's motions for front pay, back pay, and attorney's fees.

Given that Mr. Ross is not admitted to practice before this court, he is not entitled to attorneys' fees.

Furthermore, all the United States District Courts in California, including the Southern District, have conditioned admission to their respective bars on active membership in good standing in the California State Bar or on compliance with the district's *pro hac vice* rules. *See* Southern District of California Local Rules 83.3(c)(1)(a) and 83.3(c)(5); *see also Birbrower, Montalbano, Condon, & Frank, P.C. v. Superior Court of Santa Clara County*, 17 Cal.4th 119, 130 (1998) (referring to the various local rules for the federal districts in California which require membership in good standing in the California Bar as a prerequisite for admission in their respective bars). Pursuant to California Business and Professional Code § 6125, "[n]o person shall practice law in California unless the person is an active member of the State Bar." *Id.* Under § 6126(a), an individual may be guilty of a misdemeanor for holding himself "out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar." Cal. Bus. & Prof. Code § 6126(a). Importantly, Rule 1-300 of the Rules of Professional Conduct of the State Bar of California, members of the California Bar are instructed that they "*shall not aid any person or entity in the unauthorized practice of law.*" *Id.* (emphasis added).

Based on these proscriptions against the unauthorized practice of law by unlicensed individuals, California courts have developed a "policy against awarding attorney fees to unlicensed practitioners of law." *Condon v. McHenry*, 76 Cal.Rptr.2d 922, 925 (1998) (citation omitted); *see also*

Appendix B

Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal.App.2d 572, 576 (1950). The fact that Mr. Ross is duly licensed to practice law in the State of Florida has no bearing on whether he may legitimately practice law in the State of California. *See Birbrower*, 17 Cal.4th at 132 ("Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and purpose."). Furthermore, pursuant to Cal. Bus. & Prof. Code § 6127(a) and (b), an unlicensed individual can be held in contempt of court for acting as an "attorney of a court" without such authority or for advertising or holding oneself out to be "entitled to practice law" without being an active member of the California State Bar. *Id.*

Though there is some dispute as to the extent of David Ross' role as plaintiff's counsel in this case, there can be no valid dispute that Mr. Ross acted as his attorney and was practicing law on his behalf in this matter. *See Birbrower*, 17 Cal.4th at 128 (holding that the definition of the "practice of law" is broad and encompasses any form of legal advice or legal representation). This conclusion is evidenced by plaintiff's initial request for attorneys' fees for Mr. Ross' trial-related work in which plaintiff stated that "[d]uring the last stages of trial preparation and the trial attorney Ross fully participated in the case." *See* Motion for Attorneys' Fees at 11. The Retainer Agreement does not indicate Mr. Ross is not licensed in California; moreover, it states that Mr. Ross will perform "most of the legal services," and if he elects to delegate, the individuals will perform services under Mr. Ross' supervision. Though Mr. Ross' letterhead apparently indicates that he is admitted to practice in Florida,

Mr. Ross, as sole partner of the Law Offices of David L. Ross in Beverly Hills, California, holds himself out as being licensed to practice in this state and profits from the practice of law in California by his employees. As noted previously, Mr. Ross and his associates implicitly represented to this court that he was authorized to practice in this jurisdiction when he was not. Hence, under *Birbrower*, Mr. Ross was practicing law in the State of California illegally, and he is not entitled to attorneys' fees under California law.

In plaintiff's Reply, after a long justification of Mr. Ross' right to attorneys' fees, plaintiff conceded that he would not seek attorneys' fees for work Mr. Ross performed as an attorney in this case. Instead, plaintiff argues that the other California attorneys, who made the appearances in this case and did most of the work, are entitled to fees. Plaintiff levels two arguments to support the contention that Messrs. Spivak and Szabadi and Ms. Jan, all California attorneys, should be granted attorneys' fees: 1) the Law Offices of David L. Ross is a national law firm — a theory that plaintiff apparently abandoned but which will be discussed; and 2) the Law Offices of David L. Ross is an out-of-state law firm entitled to appear because it hires California attorneys.

The court turns first to plaintiff's apparently abandoned theory that the Law Offices of David L. Ross is a "national" law firm, with an office in Florida, entitled to practice law in California. At the September 14, 1998 hearing, defendant argued that even if the Law Offices of David L. Ross were a "multi-state" law firm, it is still operating illegally in California because it does not have an active partner who is admitted to practice in California. *Cf. New York Criminal*

and Civil Courts Bar Ass'n v. Jacoby, 61 N.Y.2d 130, 132 (1984) (holding that a multi-state law firm may only practice in New York if one of its active partners is admitted to practice in the state). When asked at the hearing about whether the Law Offices of David L. Ross had a partner licensed in California, Mr. Spivak became very evasive and did not answer the court's question. The exchange between the court and Mr. Spivak reads as follows:

> THE COURT: Do you have a licensed partner, Mr. Spivak?
>
> MR. SPIVAK: Your Honor, is that an issue that we need to present in open court, or is that an issue that's more appropriately to submit to the Court in camera?
>
> THE COURT: No. Wait, wait, wait, wait. That's just a question. Is there — is there a partner that's a resident (of California)?
>
> MR. SPIVAK: Your Honor, the only problem I have in answering that is the term "partner" is a very loosely-defined term, and it could mean any number of things. . . .
>
> THE COURT: I'm assuming then that there's one partner and that's Mr. Ross.
>
> MR. SPIVAK: Your Honor, I don't know if that would be a correct assumption.

THE COURT: Well, then tell me what the evidence would be. Give me the answer.

MR. SPIVAK: Uh-huh.

THE COURT: . . . "Partner" is pretty well-defined under California law, as well as under ABA rules. I just am asking you a straight question.

MR. SPIVAK: Well, unfortunately, I don't have the benefit of that definition of "partner" before me. Perhaps if the court could tell me what it's looking for, I could answer the question a little bit better. . . .

THE COURT: I'm going to assume, Mr. Spivak, there's one partner. I'm going to assume then there's one.

September 14, 1998 Hearing Transcript at 21-23.[3]

At the hearing, plaintiff requested and was granted the opportunity to submit any authority or information he claimed existed buttressing his assertion that as a "national" law firm the Law Offices of David L . Ross is entitled to practice law in California even though there is no resident partner licensed by California. In plaintiff's September 21, 1998 Response, plaintiff failed to provide any authority or

3. Under California Corporations Code § 15006(1), a partnership is defined as "an association of two or more persons to carry on as coowners a business for profit . . . ."

information which supported his argument that the Law Offices of David L. Ross is legally operating in the State of California as a "national" law firm.

As previously noted, instead of responding, plaintiff changed tactics and asserted that the California attorneys who worked on this case are entitled to attorneys' fees under Title VII because they work for an "out-of-state" law firm. According to plaintiff, the Law Offices of David L. Ross is a Florida law firm with an office in California which employs California lawyers. In support of his argument that the Law Offices of David L. Ross may properly practice in federal court, plaintiff relies on the Supreme Court's ruling in *Sperry v. State of Florida*, 373 U.S. 379, 384 (1963), which held that state licensing requirements must yield to incompatible federal legislation. However, the *Sperry* holding is inapposite in this instance given that the Southern District of California conditions admission to its bar on admission to the California State Bar; hence, there is no conflict between federal admission requirements and California requirements.

Moreover, according to the Retainer Agreement, Mr. Ross was solely responsible to plaintiff for the representations in this case and is the assignee of plaintiff's right to attorneys' fees, *See, e.g., Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F.Supp. 560, 575 (N.D.N.Y. 1995) (holding that no fees should be awarded to an unlicensed attorney who associated with a New York law firm and was the sole attorney with any obligation to the client engaged in the unauthorized practice of law in New York). In addition, Mr. Ross is the sole partner of the Law Offices of David L. Ross located in Beverly Hills, California. The Retainer

Agreement and the documents submitted with plaintiff's first fee request indicate that he was directly involved in this case by supervising all legal work; Mr. Ross will profit directly from any attorneys' fees awarded by the court. The fact that Mr. Ross hired or associated attorneys admitted to the California State Bar to prosecute his California cases does not shield him from the requirements of § 6125 or Local Rule 83.3. As the California courts have noted, "no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar." *Birbrower*, 17 Cal.4th at 126 n. 3. Thus, Mr. Ross has practiced law improperly in this court, and as a matter of law and public policy, the court cannot award him attorneys' fees.[4]

Pursuant to 42 U.S.C. § 2000e-5(k), the court is authorized to award attorneys' fees to the prevailing party, in this case, Mr. Sandoval. However, the court finds that the factors discussed herein constitute "special circumstances" militating against an award of attorneys' fees. *See Birbrower*, 17 Cal.4th at 126. In sum, pursuant to the Retainer Agreement, Mr. Sandoval assigned his rights to attorneys' fees to the Law Offices of David L. Ross. Mr. Ross is not lawfully entitled to practice law in this state or in this court. Mr. Ross and Mr. Spivak implicitly represented to the court that Mr. Ross was licensed to practice when he was not. Though California attorneys performed substantial and successful work on this case, the court cannot award

---

4. Furthermore, Mr. Ross is subject to sanctions pursuant to Local Rule 83.3(i): "The court may order any person who practices before it in violation of Civil Local Rule 83.3 to pay an appropriate penalty . . . ."

attorneys' fees to the plaintiff because plaintiff has assigned those rights to David L. Ross. Furthermore, it would violate public policy to reward those California attorneys who are aiding Mr. Ross in his unauthorized practice of law in this state in violation of Rule 1-300 of the Rules of Professional Conduct of the State Bar of California. Thus, plaintiff is not entitled to attorneys' fees in this case.

B. *Pattern of Bad Faith Practice*

In this case, the court finds it necessary to illustrate Mr. Spivak's, plaintiff's trial counsel's, bad faith practices in the prosecution of this case. Such practices and misrepresentations to the court militate against any equitable considerations for the awarding of attorneys' fees. Though plaintiff's counsel was effective and achieved a verdict for plaintiff, counsel engaged in a pattern of practices which border on being flagrantly unethical and cannot be considered merely innocent mistakes. These practices are pertinent because to the court they corroborate the fact that many of the implicit representations discussed in the prior section were not the result of innocent error.

As noted previously, Mr. Ross and Mr. Spivak implicitly misrepresented to the court that Mr. Ross was licensed to practice law in this court. Though Mr. Ross appeared in court on behalf of his client and conferred with the court during the trial at side-bar and in chambers, he never indicated to the court that he was not licensed to practice in California nor that he was not admitted *pro hac vice* to practice in this district. In fact, the court sought Mr. Ross' assistance in checking Mr. Spivak's over-zealous advocacy. At no point

did Mr. Ross indicate to this court that he could not practice law in California.

In addition, Mr. Spivak, plaintiff's trial counsel, constantly engaged in trial tactics that ignored the court's repeated warnings and evidentiary rulings. Most troubling was Mr. Spivak's repeated references, in argument and while questioning witnesses, to the alleged Nazi conspiracy in the Customs Department. The court had made specific rulings that such references were marginally relevant to this case and were highly prejudicial and, consequently, should be excluded pursuant to Federal Rule of Evidence 403. Despite the court's clear pre-trial ruling on this matter, Mr. Spivak repeatedly made reference to the purported Nazi conspiracy during trial.

Although disregard of evidentiary rulings concerning the alleged Nazi conspiracy were the most obviously prejudicial violations, Mr. Spivak consistently ignored evidentiary rulings and reasked improper questions, often three or four times. These tactics, which directly ignored rulings and repeated in-trial warnings, forced defendant to make a Hobson's choice. If defendant objected to Mr. Spivak's improper comments or questions, it would appear as if the government were attempting to hide information from the jury. This was an unattractive option for defendant given that plaintiff was presenting a theory to the jury that the Customs Department was hiding evidence and was involved in a widespread cover-up. However, if the government failed to object to these improper references, the jury was likely to hear objectionable or improper evidence. Plaintiff's counsel ignored the court's orders on numerous occasions. Not only

did Mr. Spivak disregard this court's orders, but he also jeopardized and prolonged the entire case with his highly prejudicial references and vagrant disregard of court rulings.

His tactics also led defendant to file motions for mistrial, a motion for a new trial, and a motion for judgment as a matter of law based in part on Mr. Spivak's disregard for the court's orders. This, in turn, led to more attorneys' fees, a further extension of this case, and a diversion of judicial resources. Hence, Mr. Spivak's trial tactics not only exacerbated the amount of resources devoted to this case but corroborate the court's conclusions about the intentional nature of the failure of Mr. Spivak and Mr. Ross to inform the court correctly of Mr. Ross' status.

With respect to the attorneys' fee issue, Mr. Spivak continued to choose tactics that prolonged this matter as well mislead the court. As noted previously, during the September 14, 1998 hearing, Mr. Spivak made certain statements which were misleading to the court. First, he refused to answer the court's questions regarding the partnership arrangement at the Law Offices of David L. Ross. Given Mr. Spivak's reticence, the court determined that David Ross is the sole partner of this law firm based in Beverly Hills. Nothing yet has been submitted that would contradict this finding.

In addition, when asked about the law firm's fee arrangement with Mr. Sandoval, without hesitation, Mr. Spivak indicated to the court that the only fees that the firm could recover pursuant to the Retainer Agreement were the fees awarded pursuant to 42 U.S.C. § 2000e-5(k). However, after reviewing the Retainer Agreement finally provided to

the court after the hearing, the court noted that Mr. Sandoval had agreed to pay the Law Offices of David L. Ross hourly fees in addition to assigning to the firm his rights to receive attorneys' fees under Title VII. This is a much different arrangement that the one described by Mr. Spivak at the September 14, 1998 hearing.

Plaintiff's counsel has also shifted his factual contentions regarding the status of the Law Firm of David L. Ross. Initially, counsel described the firm as a "national" law firm that is properly practicing in the State of California. However, after disclosing that the law firm may have one additional office in Florida, counsel retreated from this position and argued instead that the Law Offices of David L. Ross is an "out-of-state" law firm, that uses California attorneys to practice law in this state. After contacting the Florida State Bar and discovering that Mr. Ross has listed his California address as his primary business address, the court determined that Mr. Ross maintains his primary practice in Beverly Hills, California. Plaintiff's counsel submitted a Supplemental Response in which plaintiff asserts that Mr. Ross maintains an office in Florida within the law firm of Spencer & Klein in Miami, Florida. Though Mr. Ross may maintain office space within this other law firm, all evidence submitted indicates that his primary office is in California. This vitiates plaintiff's counsel's contentions that the Law Offices of David L. Ross is a "national" law firm, a term never defined by plaintiff's counsel, or an "out-of-state" law firm. Instead, all evidence indicates that Mr. Ross is operating a full-time law firm in California which may represent an illegal practice of law in California. Indeed the Law Offices of David L. Ross located in Beverly Hills has several other cases pending in the Southern District of California.

Appendix B

Furthermore, plaintiff's counsel has changed its position regarding the role of Mr. Ross in this litigation. Plaintiff's counsel initially indicated that Mr. Ross was the counsel of record and served in a supervisorial capacity in this case, monitoring the actions of the California-licensed attorneys he had hired. *See* Ross Declarations at ¶¶ 1-2 & 17. When the serious issue arose concerning whether Mr. Ross has been practicing illegally before this court, Mr. Spivak stated the following during the September 14, 1998 hearing: "Mr. Ross did not supervise this case. He provided limited guidance on this case. . . . He never made a representation to the Court nor appeared to the Court on any pleadings that he was an attorney of record in any form." September 14, 1998 Hearing Transcript at 27. As noted previously, Mr. Ross and Mr. Spivak did implicitly at least make representations to this court that Mr. Ross was the acting supervising partner in this case and that he was licensed to practice in this state. Given that the Law Offices of David L. Ross is plaintiff's counsel, according to the Retainer Agreement, Mr. Spivak cannot, in good faith, claim that Mr. Ross was neither involved in this case nor counsel of record. Most compelling is Mr. Ross' Declaration, signed under penalty of perjury, submitted with plaintiff's original fee request which states that Mr. Ross is the counsel of record for Mr. Sandoval and that he acted as one of two trial counsel during this case.

The court also notes that it requested that Mr. Ross appear at the September 14, 1998 hearing. Mr. Ross did appear in court originally and sat in the gallery with the general public. However, when the discussion during the hearing focused on the issue of Mr. Ross' practice of law, Mr. Ross left the courtroom and did not return.

Appendix B

All of these incidents and misrepresentations highlight plaintiff's attorneys' gamesmanship and lack of professionalism in this case. Given the frequency and egregiousness of these incidents, the court concludes that the denial of attorneys' fees to plaintiff is appropriate in this case.

C. *Judgment in California Superior Court Case No. BC150846*

Before discussing the Judgment in California Superior Court Case No. BC150846, the court notes the following chronology concerning the attorneys' fees request:

1) On July 20, 1998, plaintiff initially requested that plaintiff be awarded $324,401.00 in fees, representing the work of four attorneys (David Spivak, David Ross, Wendy Jan, and Peter Szabadi) for a total of 1732.54 hours. This includes a charge of $54,950 for 219.80 hours of Mr. Ross' legal services. Mr. Ross primarily generated his fees during the trial phase of this litigation and plaintiff claims to have discounted the time Mr. Ross spent on this case to eliminate any duplicative billing;

2) Defendant submitted his Opposition which primarily argued that the court could not award attorneys' fees to Mr. Ross, an unlicensed attorney practicing illegally before this court and in this state;

3) Although justifying Mr. Ross' role rather defiantly and attacking the government for this objection, plaintiff modified his requests in the Reply based on defendant's objections by excluding any charges for work conducted by

Mr. Ross after the administrative hearing stage and other inapplicable charges.[5] Along with the Reply, plaintiff submitted a Summary of Amended Attorney Charges and Expenses that lists the total charges for attorneys' fees as $281,551 plus costs totaling $31,073. Specifically, plaintiff reduced his requests for Mr. Ross' fees to $8,400 for 33.60 hours spent representing plaintiff at the administrative stage. Plaintiff argued that the court could award attorneys' fees to the Law Offices of David L. Ross became it is a "national law practice" entitled to practice law in the State of California;

4) At the oral hearing on September 14, 1998, plaintiff's counsel represented that the Law Offices of David L. Ross was a "national law firm" and that they could present advisory opinions from the California State Bar which would buttress their argument. The court requested that plaintiff's counsel provide the court with any such authority. None was forthcoming;

5) In his Response on September 18, 1998, plaintiff presented a novel argument explaining why the court could award attorneys' fees to the Law Office of David L. Ross. Plaintiff argued that this firm is an "out-of-state" law firm

---

5. In his Reply, plaintiff stated the following: "Defendant has completely missed the fundamental proposition regarding the manner in which one is authorized to practice law in a jurisdiction. The law firm, here, the law offices of David L. Ross, does not practice law — its partners and associates do. The law firm is not admitted to practice, only its partners and associates are." Reply at 7. However, as previously noted, when the court asked Mr. Spivak to identify the partners of Mr. Ross' firm in Beverly Hills, California at the September 14, 1998 hearing, Mr. Spivak refused to answer.

entitled to practice law in California since Mr. Ross hires California attorneys;

6) On September 23, 1998, defendant submitted a Reply to plaintiff's Response. Defendant stated that he was unable to find Mr. Ross' office in Florida and that the law firm in California was not entitled to attorneys' fees because Mr. Ross was practicing illegally in this state and court;

7) Plaintiff submitted a Supplemental Response on September 24, 1998, in which plaintiff's counsel attacks defendant for his accusation that Mr. Ross has no law office in Florida and states that Mr. Ross maintains an office within a separate law firm in Miami, Florida;

8) Without notice on October 2, 1998, plaintiff faxed a copy of a stipulated judgment filed January 7, 1997, in a case filed by the State Bar of California against David Ross in the Superior Court for the State of California for the County of Los Angeles, Case No. BC150846.

The court has summarized the above chronology because sadly it illustrates the manner in which plaintiff's trial counsel's tactics obfuscated the issues and protracted this litigation. If Mr. Ross or Mr. Spivak believed that Mr. Ross' status as counsel was lawful, then at a minimum, the Superior Court judgment dated January 7, 1997, should have been discussed in plaintiff's original Reply dated September 8, 1998. Instead, trial counsel argued the "national law firm" theory and the "Florida law firm" theory, misrepresented the fee agreement, and refused to inform the court as to the partners in Mr. Ross' firm.

Appendix B

Insofar as the California Superior Court judgment in Case No. BC150846 is concerned, it does not help plaintiff in his request for attorneys' fees for any lawyers involved in this case. First, pursuant to paragraphs three (3) and four (4) of the judgment, Mr. Ross is required to notify his client and all employees, agents, and representatives of David L. Ross that David L. Ross is not licensed to practice law by the State of California. Hence, his client and the properly licensed attorneys who assisted on this case either knew of Ross' status or should have known.

Second, although someone, presumably Mr. Ross or an assistant, underlined the first sentence of paragraph two (2) of the judgment, the second sentence is more important for the purposes of this case. The second sentence of paragraph two (2) reads as follows: "In addition, the Ross Defendants are not restrained by the terms of this Judgment in any manner from the practice of law legally and in accordance with applicable federal and state law, including the practice of administrative law and the practice of law in any federal forum located in the State of California in which the Ross Defendants are admitted or are duly authorized to practice law."

Hence, assuming Mr. Ross were admitted to the California Bar or properly admitted to the District Court for the Southern District of California, he could have practiced in this court. However, the bottom line is he is *not* lawfully admitted to practice in California or the Southern District of California, and yet he and Mr. Spivak implicitly represented that Mr. Ross was entitled to practice in this jurisdiction. Mr. Ross sought fees of over $54,950 for 219.80 hours

devoted to this case, a vast number of which were attributable to Mr. Ross' appearances in court supervising Mr. Spivak. Paragraph one (1) of the judgment prohibits, in part Mr. Ross and his agents and employees from "implying that Defendant David L. Ross is a California licensed attorney or is practicing or entitled to practice law in the state courts of California." *See* Judgment, Ex. B. at ¶ 2(a).

Again, any fees that the court awards plaintiff are assigned to David L. Ross pursuant to the Retainer Agreement. This court cannot sanction the illegal practice of law in this court and will not order the defendant to compensate plaintiff's counsel for the egregious pattern of explicit and implicit misrepresentations made to this court throughout this litigation.

V. *CONCLUSION*

Based on the foregoing analysis, the court **DENIES** plaintiff's Motion for Attorneys' Fees. The court refers this order to the respective disciplinary boards of the California State Bar and Florida State Bar for investigation of David L. Ross in this matter.

IT IS SO ORDERED.

10-6-98
Date

s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 30, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-56831
D.C. No. CV-95-00970-JNK

RICARDO A. SANDOVAL,

Plaintiff-Appellant,

v.

ROBERT E. RUBIN, Secretary of the United States Treasury, in his official capacity, as agency head,

Defendant-Appellee,

and

WILLIAM ROHDE, in his individual and official capacity as an officer of the United States Service, United States Department of the Treasury; JOEL A. GEISNER, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury; CHARLES C. MANTLE, in his individual and official capacity as an officer of the United States Customs Service, United States Department of the Treasury,

Defendants.

Appendix C

ORDER

Before: **KOZINSKI, T. NELSON** and **WARDLAW,** Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the petition for rehearing en banc and, no active judge having requested a vote thereon, the petition is denied. Fed. R. App. P. 35.

APPENDIX D — JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES IN *THE STATE BAR OF CALIFORNIA v. DAVID L. ROSS, et al.*, CASE NO. BC150846 DATED AND FILED JANUARY 7, 1997

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
JUDY JOHNSON, CHIEF TRIAL COUNSEL
VICTORIA R. MOLLOY, Bar No. 097747
JAMES R. DIFRANK, Bar No. 105591
KRISTIN L. STEINBERG, Bar No. 149966
1149 South Hill Street
Los Angeles, California 90015-2299
Telephone: (213) 765-1000

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

Case No. BC150846

Assigned for all purposes to
Judge Kurt Lewin
Department: 4

THE STATE BAR OF CALIFORNIA,

Plaintiff,

v.

DAVID L. ROSS, individually, and DAVID L. ROSS dba LAW OFFICES OF DAVID L. ROSS, DOES 1-50, inclusive,

Defendants

Appendix D

JUDGMENT

The Court having reviewed the Settlement Agreement and Stipulation for Judgment and finding it to be in the best interests of the public and the parties and good cause appearing, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The Ross Defendants, their successors, officers, agents, servants, representatives, employees, and all persons, corporations, or other entities acting under, by, through, or on behalf of the Ross Defendants, or acting in concert with or participating with or for the Ross Defendants, and each of them, are hereby permanently prohibited, enjoined, and restrained from engaging in the following practices:

a. advertising, holding out, or directly expressing in writing or verbally, or otherwise implying that Defendant David L. Ross is a California licensed attorney or is practicing or entitled to practice law in the state courts of California;

b. otherwise engaging in the practice of law in the state courts of California without complying with appropriate California law and State Bar of California admission requirements;

c. promulgating or disseminating any advertisement which contains any false, misleading or deceptive statement or which omits to state any fact necessary to make the statements made, in light of the circumstances under which they are made, not false, misleading or deceptive; and

d. promulgating or disseminating any letterhead, business cards, stationery or other advertising material without expressly stating in such material the specific state or states in which Defendant David L. Ross holds a valid, active license(s) to practice law. This subsection shall not apply to the business cards of any California licensed attorney who is employed by the Ross Defendants if the individual attorney's name appearing on the business card belongs to the California licensed attorney employed by the Ross Defendants;

2. The Ross Defendants may employ attorneys duly licensed by the State of California to engage in the practice of law on behalf of the Ross Defendants. In addition, the Ross Defendants are not restrained by the terms of this Judgment in any manner from the practice of law legally and in accordance with applicable federal and state law, including the practice of administrative law and the practice of law in any federal forum located in the state of California in which the Ross Defendants are admitted or are duly authorized to practice law.

3. Within sixty days after the entry of judgment in this matter, defendant David L. Ross shall disclose to all current law-related clients of David L. Ross and David L. Ross dba Law Offices of David L. Ross that Defendant David L. Ross is licensed to practice law by the State of Florida. In addition, prior to or at the time of being retained by any future law-related clients and prior to undertaking any substantive legal services on behalf of any future law-related clients, Defendant David L. Ross shall disclose to all such future law-related clients of David L. Ross and of David L. Ross

dba Law Offices of David L. Ross that Defendant David L. Ross is licensed to practice law by the State of Florida. Defendant David L. Ross may satisfy the requirement of this subsection by providing all clients of David L. Ross and of David L. Ross dba Law Offices of David L. Ross with any form of communication on the Ross Defendants' stationery which advises said clients that Defendant David L. Ross is licensed to practice law by the State of Florida.

4. Within sixty days after the entry of judgment, Defendant David L. Ross shall provide written notice to all current officers, employees, agents and representatives of David L. Ross, of David L. Ross dba Law Offices of David L. Ross, and of any law corporation in which Defendant David L. Ross is an officer or a principal shareholder that Defendant David L. Ross is licensed to practice law by the State of Florida, that Defendant David L. Ross is not licensed to practice law by the State of California, and that they may not advertise, hold out, or directly express in writing or verbally, or otherwise imply that David L. Ross is a California licensed attorney. In addition, prior to or at the time of employing, retaining, or contracting with any future officers, employees, agents or representatives of David L. Ross, of David L. Ross dba Law Offices of David L. Ross, and of any law corporation in which Defendant David L. Ross is an officer or a principal shareholder, Defendant David L. Ross shall provide the same written notice to such future officers, employees, agents and representatives. In each of the declarations required of Defendant David L. Ross by paragraph 5 below, Defendant David L. Ross shall state the name and title or capacity of each officer, employee, agent and representative to whom Defendant David L. Ross has

provided the written notice required by this subsection during the applicable period covered by the declaration.

5. Defendant David L. Ross shall provide written declarations under penalty of perjury to the Office of the Chief Trial Counsel of the State Bar of California, Los Angeles office, not later than sixty days after the entry of judgment in this matter and on January 10, 1998 and January 10, 1999. In each declaration, Defendant David L. Ross shall certify under penalty of perjury that he has complied with the court's Judgment in this matter during the preceding calendar year or applicable portion thereof. In each declaration required by this subsection, Defendant David L. Ross shall state the name and title or capacity of each officer, employee, agent and representative to whom Defendant David L. Ross has provided the written notice required by subsection 4 above during the applicable period covered by the declaration. In addition, Defendant David L. Ross shall notify the Office of the Chief Trial Counsel of the State Bar of California, Los Angeles office, of any change of his business address or telephone number within thirty days after such change.

6. The provisions of this decree shall apply and be given effect only as to such of the Ross Defendants' activities which are carried on within the State of California or which affect citizens, residents, or persons within the State of California.

7. This Court hereby retains jurisdiction of the subject matter of this action and of any and all disputes and controversies of the parties which may arise with reference thereto in the future.

8. It is further ordered that no proceedings for contempt of this decree shall be instituted unless and until Plaintiff has given twenty (20) days written notice, by registered or certified mail addressed to the particular Defendant or Defendants complained of, of the act or omission complained of and of Plaintiff's intention to institute a contempt proceeding. Within the twenty-day period, the Defendant or Defendants may discontinue the acts or omissions complained of by Plaintiff and thereby purge themselves of the alleged contempt asserted by Plaintiff.

9. Any party may institute a proceeding of declaratory relief herein whereby this Court may determine whether or not, for the future guidance of the parties, the acts or omissions asserted by plaintiff would in truth, in fact, and in law constitute a violation or violations of the terms and conditions of this decree.

10. This Court also retains jurisdiction for the purpose of entertaining any application made by any party to this action for the modification of any provision of this decree or the otherwise granting of appropriate relief.

11. This Judgment shall become null and void at such time as Defendant David L. Ross has been admitted as a member of the State Bar of California.

12. Finally, it is hereby ordered that each party shall bear its own costs.

Date: JAN 07 1997 s/ Kurt Lewin
THE HONORABLE KURT LEWIN,
JUDGE OF THE SUPERIOR
COURT

Supreme Court, U.S.
FILED
APR 2 2001
OFFICE OF THE CLERK

No. 00-1232

In the Supreme Court of the United States

RICARDO A. SANDOVAL, PETITIONER

v.

PAUL H. O'NEILL, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
MARLEIGH D. DOVER
DANIEL KAPLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the district court did not abuse its discretion in refusing to award petitioner attorney's fees pursuant to 42 U.S.C. 2000e-5(k) where petitioner's counsel of record, the assignee of petitioner's right to any fee award, was not authorized to practice before the court, yet misled the court into believing otherwise, and where petitioner's lead trial counsel knowingly aided petitioner's counsel of record in his unauthorized practice of law and in his misrepresentations to the court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	9
Birbrower, Montalbano, Condon & Frank, P.C. v. *Superior Court*, 949 P.2d 1 (Cal.), cert. denied, 525 U.S. 920 (1998)	14
Brown v. *Stackler*, 612 F.2d 1057 (7th Cir. 1980)	10
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978)	5
Fair Hous. Council of Greater Wash. v. *Landow*, 999 F.2d 92 (4th Cir. 1993)	10
Greenbaum v. *Svenska Handelsbanken*, 998 F. Supp. 301 (S.D.N.Y. 1998)	10
Hensley v. *Eckerhart*, 461 U.S. 424 (1983)	10
Lewis v. *Kendrick*, 944 F.2d 949 (1st Cir. 1991)	10
Newman v. *Piggie Park Enters., Inc.*, 390 U.S. 400 (1968)	9
Peter v. *Jax*, 187 F.3d 829 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000)	10
White v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982)	10-11
Z.A. v. *San Bruno Park School Dist.*, 165 F.3d 1273 (9th Cir. 1999)	13-14

Statutes, regulations and rules:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 5, 9, 11, 13, 14
42 U.S.C. 2000e-5(k)	2, 3, 9, 10

Statutes, regulations and rules—Continued: Page

Cal. Bus. & Prof. Code (West 1990):
§ 6125 6
§ 6126 (a) 6
42 U.S.C. 1988 ..... 10, 11
42 U.S.C. 1988 (1994 & Supp. IV 1998) 10
Sup. Ct. R. 35.3 2
Cal. Bar R. of Professional Conduct R. 1-300 ..... 6, 12
S.D. Cal. R. 83.3(b) 6

Miscellaneous:

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) 10

In the Supreme Court of the United States

No. 00-1232

RICARDO A. SANDOVAL, PETITIONER

v.

PAUL H. O'NEILL, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended memorandum of the court of appeals (Pet. App. 1a-6a) is unreported. The order of the district court (Pet. App. 7a-40a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2000. A petition for rehearing was denied on October 30, 2000 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on January 29, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Mexican-American employee of the United States Customs Service, was represented by the Law Offices of David L. Ross in the underlying action brought against respondent[1] pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for allegedly subjecting him to national origin discrimination and retaliation for engaging in activity protected by Title VII. Pet. App. 7a-8a.

The Retainer Agreement signed by petitioner and Ross indicated that Ross "expect[ed] to be performing most of the legal services on [petitioner's] behalf." Pet. App. 16a. The agreement also specified that petitioner assigned all rights in any fee award to the Law Offices of David L. Ross. *Id.* at 17a- 18a.

A ten-day jury trial was held on petitioner's complaint (Pet App. 8a), during which Ross supervised lead trial counsel David Spivak, who had not tried a case before. Ross "sat at counsel's table throughout the trial, attended *in camera* sessions, and participated at side-bars along with Mr. Spivak." *Id.* at 23a. The firm address on all of petitioner's pleadings was "Law Offices of David L. Ross, P.O. Box 18137, Beverly Hills, CA, 90209." *Id.* at 11a.

After the jury rendered a verdict in petitioner's favor, petitioner moved for an award of attorney's fees pursuant to 42 U.S.C. 2000e-5(k).[2] Pet. App. 8a-10a.

---

[1] The current Secretary of the Treasury is substituted for the previously-named defendant pursuant to this Court's Rule 35.3.

[2] Section 2000e-5(k) provides:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as

Ross submitted a declaration in support of the fee request in which he stated, under penalty of perjury, that (1) he was petitioner's attorney of record, (2) he had spent "a substantial number of hours" "supervising and assisting" Spivak, and (3) he had "assist[ed] in the preparation of trial and attending trial, organizing the presentation of evidence and witnesses, otherwise aiding in the trial of this matter and opposing [respondent's] post-trial motions." *Id.* at 22a. The motion for fees contained the representation that "[d]uring the last stages of trial preparation and the trial attorney Ross fully participated in the case." *Id.* at 25a.

The government opposed the fee request, based primarily on a fact that Ross and his associates had failed to bring to the court's attention: Ross was not licensed to practice law in the United States District Court for the Southern District of California, in which the trial was held, or in the State of California. Pet. App. 10a-11a.[3] The government argued that Ross, the assignee of any fees the court might award pursuant to the Retainer Agreement, had acted illegally in holding himself out as an attorney licensed to practice in that court, and should not be rewarded for such conduct. *Id.* at 11a. The government further argued that petitioner's other lawyers improperly aided Ross in his

---

part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. 2000e-5(k).

[3] The United States District Court for the Southern District of California conditions admission to its bar on active membership in good standing in the California State Bar. Pet. App. 24a. As a resident of California with an office in that State, Ross was not eligible to appear *pro hac vice*. *Id.* at 21a.

misrepresentations, and therefore were likewise undeserving of a fee award.

In response, petitioner alleged that the Law Offices of David L. Ross was a "national" law firm and was properly practicing law in California by employing California lawyers. Pet. App. 11a. At a hearing on the fee issue, the district judge asked Spivak to submit "authority or information" supporting this assertion. *Ibid.* Petitioner's response to the court's request, however, contained no such authority or information. *Id.* at 12a, 28a-29a. Instead, the response proffered a new theory justifying Ross's representation of petitioner, arguing that the California lawyers employed to work on the case were entitled to attorney's fees because they legitimately used an "out-of-state" law firm name. *Id.* at 12a.

During the hearing, Spivak proffered yet another theory, arguing that even if the Law Offices of David L. Ross was a "multi-state" law firm, its representation of petitioner before the district court was proper because it had an active partner admitted to practice in California. In response to the court's questions, Spivak became "very evasive" and could not identify such a partner. Instead, Spivak protested that "the term 'partner' is a very loosely-defined term, and it could mean any number of things." *Id.* at 26a-27a. In light of Spivak's equivocations, the court stated that it would assume that such a partner did not exist. *Id.* at 28a.

Subsequently, Ross faxed the court a copy of a final judgment rendered nearly two years earlier by the Superior Court of the State of California in a case captioned *State Bar of California* v. *David L. Ross, individually, and David L. Ross, d.b.a. Law Offices of David L. Ross.* Pet. App. 12a-13a, 43a-48a. The judgment implemented a settlement agreement entered into

by Ross and the enforcement section of the State Bar of California, permanently enjoining Ross, the Law Offices of David L. Ross, their "servants, representatives [and] employees," and "all persons * * * acting under, by, through, or on behalf of" them, from "advertising, holding out, or directly expressing in writing or verbally, or otherwise implying that Defendant David L. Ross is a California licensed attorney or is practicing or entitled to practice law in the state courts of California." *Id.* at 44a. The judgment specified that defendants could "employ attorneys duly licensed by the State of California" to practice law on their behalf, and could practice law in any federal forum located within California "in which the [defendants] are admitted or are duly authorized to practice law." *Id.* at 45a. Ross did not explain why he had waited until "the eleventh hour" to bring this judgment to the court's attention. *Id.* at 13a.

2. In light of these circumstances, the district court denied petitioner's fee request. Noting that prevailing Title VII plaintiffs ordinarily are to be awarded fees "in all but special circumstances," Pet. App. 21a (quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978)), the court found that such "special circumstances" were present. First, the court noted that Ross, the assignee of the right to attorney's fees pursuant to the Retainer Agreement, was not licensed to practice law in the State of California nor in the Southern District of California, and was ineligible to appear *pro hac vice*. *Ibid.* The court detailed Ross's extensive supervisory role at trial, and noted that it had relied on Ross's "implicit representations that he was a duly admitted attorney in this jurisdiction." *Id.* at 23a. Because Ross "misled this court and has been improperly practicing law in this jurisdiction," the court

found that he violated Local Rule 83.3(b), which provides that "[o]nly a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order," and California Business and Professional Code § 6125 (West 1990), which provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." *Id.* at 23a-24a.[4] The court further noted that Rule 1-300 of the Rules of Professional Conduct of the State Bar of California provides that members of the California Bar "*shall not aid any person or entity in the unauthorized practice of law.*" *Id.* at 24a (emphasis added by district court).

The court rejected petitioner's arguments that his other lawyers should be entitled to fees because (1) the Law Offices of David L. Ross is a "national" law firm and (2) the Law Offices of David L. Ross is an out-of-state law firm entitled to appear because it hires California attorneys. The court found no evidence in support of the first contention. Pet. App. 26a-29a. Regarding the second contention, the court found that (1) Ross is the sole partner of the Law Offices of David L. Ross, (2) the Law Offices of David L. Ross is located not out-of-state but in Beverly Hills, (3) "Ross was solely responsible to [petitioner] for the representations in this case and is the assignee of [petitioner's] right to attorneys' fees," (4) Ross did in fact work on the case, and (5) "[t]he fact that Mr. Ross hired or associated

---

[4] As the court also noted, a person who holds himself "out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar" is guilty of a misdemeanor. Pet. App. 24a (quoting Cal. Bus. & Prof. Code § 6126(a) (West 1990)).

attorneys admitted to the California State Bar to prosecute his California cases does not shield him from the requirements of § 6125 or Local Rule 83.3." *Id.* at 29a-30a. Accordingly, the court declined to award attorney's fees to Ross or to petitioner's other lawyers, who, the court found, "aid[ed] Mr. Ross in his unauthorized practice of law in this state in violation of Rule 1-300 of the Rules of Professional Conduct of the State Bar of California."[5] *Id.* at 31a.

In further support of its decision not to award attorney's fees, the court noted that Spivak, petitioner's lead trial counsel, had engaged in a pattern of "bad faith practices" that "border[ed] on being flagrantly unethical and cannot be considered merely innocent mistakes." Pet. App. 31a. In particular, the court noted that during trial, Spivak made "repeated references" to an alleged "Nazi conspiracy" in the Customs Department—an allegation that the court had specifically ruled inadmissable in a pre-trial ruling. *Id.* at 32a. Furthermore, Spivak "consistently ignored evidentiary rulings and reasked improper questions, often three or four times." *Ibid.* These actions, the court found, needlessly prolonged the trial and incurred additional attorney's fees. *Id.* at 33a. Likewise, in the post-trial hearings and filings regarding the fee issue, Spivak continued his time-wasting and "mislead[ing]" tactics. *Ibid.* He refused to answer the court's request for verification of his assertion that the Law Offices of David L. Ross had a partner admitted to practice in California, made false statements regarding the substance of the Retainer Agreement, "shifted his factual contentions regarding the status of the Law Firm of

---

[5] The court also referred its order to the disciplinary boards of the California State Bar and the Florida State Bar. Pet. App. 40a.

David L. Ross," and contradicted Ross's own declaration with regard to the nature of Ross's participation in the case. *Id.* at 33a-35a. The court found that this pervasive pattern of "gamesmanship and lack of professionalism," *id.* at 36a, served to bolster its conclusion that Ross's "implicit representations" that he was licensed to practice before it were "not the result of innocent error," and thereby "militate[d] against any equitable considerations for the awarding of attorneys' fees." *Id.* at 31a.

Finally, the court concluded that petitioner could not avail himself of the California Superior Court judgment that Ross had belatedly brought to the court's attention. Although petitioner had relied on the statement in the judgment that "[t]he Ross Defendants may employ attorneys duly licensed by the State of California to engage in the practice of law on behalf of the Ross Defendants," Pet. App. 45a, the court noted that the judgment did not permit Ross to practice lawfully before a California state or federal court without being admitted to such a court, nor did it countenance the misrepresentations by Ross and Spivak regarding Ross's status, *id.* at 39a-40a.

3. In an unreported memorandum disposition, the court of appeals affirmed the district court's denial of petitioner's fee request. The court held that the district court's finding that Ross had misrepresented his authorization to practice law before it was not clearly erroneous, and that "[t]he unauthorized practice of law and the misrepresentation of an attorney's status certainly create a special circumstance that would render a fee award to [petitioner's] counsel unjust." Pet. App. 5a. Thus, the court held, the district court did not abuse

its discretion in denying petitioner's request for attorney's fees.[6]

ARGUMENT

The court of appeals' decision was correct, and does not conflict with any decision of this Court or of any other court of appeals. Although prevailing Title VII plaintiffs ordinarily are entitled to attorney's fees, the district court did not abuse its discretion in denying fees in this case, given the extraordinary pattern of deception and misconduct by petitioner's counsel of record, who was not legally entitled to bring petitioner's case, yet who nevertheless knowingly led the court to believe that he was, and whose chief associate aided in his misrepresentations. Further review by this Court is therefore not warranted.

1. Title VII provides that a court "in its discretion, may" award fees to a prevailing party. 42 U.S.C. 2000e-5(k). In light of Congress's intent that civil rights plaintiffs act as "private attorney[s] general," this Court has stated that prevailing plaintiffs should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (specifically applying *Piggie Park* standard to Title VII plaintiffs).

Courts have found such "special circumstances" to exist when plaintiff's counsel has engaged in an extra-

---

[6] The court of appeals modified the district court's judgment in one respect, specifying that "[b]ecause the fee award was denied on account of attorney misconduct and through no fault of the client, counsel may recover no attorneys' fees from [petitioner]," and directing the district court to incorporate a statement to that effect in its final judgment. Pet. App. 6a.

ordinary pattern of misconduct. See, *e.g.*, *Peter* v. *Jax*, 187 F.3d 829, 837-839 (8th Cir.), cert. denied, 529 U.S. 1098 (2000) (affirming district court's refusal to award fees to prevailing plaintiffs under 42 U.S.C. 1988,[7] as an alternative ground to the finding that plaintiffs were not "prevailing parties," because, *inter alia*, plaintiffs' counsel continued to litigate and incur fees despite knowing that a case pending in this Court would likely resolve the issue in dispute); *Fair Hous. Council* v. *Landow*, 999 F.2d 92, 97-98 (4th Cir. 1993) (denying attorney's fees under Section 1988 due to plaintiff's counsel's "outrageously excessive" fee request); *Lewis* v. *Kendrick*, 944 F.2d 949, 955-958 (1st Cir. 1991) (reversing district court's award of fees to prevailing plaintiff under 42 U.S.C. 1988 because, *inter alia*, plaintiff's counsel pressed "totally unsupported" claims and prepared clearly excessive fee request); *Brown* v. *Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (denying attorney's fees under Section 1988 due to plaintiffs' counsel's "intolerably inflated" fee request); *Greenbaum* v. *Svenska Handelsbanken*, 998 F. Supp. 301, 305 (S.D.N.Y. 1998) (refusing to award fees under 42 U.S.C. 2000e-5(k) for work spent on closing argument because closing argument was "rife with impermissible references and necessitated constant interruptions with appropriate objections"); cf. *White* v. *New Hampshire*

---

[7] Cases involving fee shifting under 42 U.S.C. 1988 (1994 & Supp. IV 1998) are included here in light of this Court's recognition that fee-shifting under that statute is governed by the same standards as fee-shifting in the Title VII context. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983) ("The legislative history of [42 U.S.C.] 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'") (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)).

Dep't of Employment Sec., 455 U.S. 445, 454 (1982) (fees may be denied under Section 1988 if motion for fees "unfairly surprises or prejudices" opposing party or is untimely filed).

2. Because the lawyer in charge of plaintiff's case was not entitled to practice before the court, and because he and his associate repeatedly misled the court into believing otherwise, the district court did not abuse its discretion in finding that "special circumstances" warranted the denial of attorney's fees. Given the unique circumstances of this case, the denial of attorney's fees did not contravene the goals of the fee-shifting provision of Title VII.

As the district court found, Ross, petitioner's counsel of record, was not admitted to practice in California, and therefore was not entitled to practice before the district court. However, Ross, in conjunction with Spivak, "misled" the court into believing that he was so entitled, making "implicit representations that he was a duly admitted attorney" upon which the court had relied. Pet. App. 23a. Neither Ross nor Spivak ever presented any evidence in support of their shifting theories that purported to justify Ross's representation of petitioner despite Ross's inability to practice in California. The court noted that, pursuant to the Retainer Agreement between petitioner and his counsel, any fee award would be the property of the Law Firm of David L. Ross, and effectively of Ross himself (who had sole control over the firm), despite the fact that Ross was not authorized to practice before the district court or before the courts of the State of California. *Ibid.*

The court correctly drew further support for its denial of fees from the behavior of Spivak, the attorney who litigated the trial under Ross's supervision and

later defended the fee request. As the court noted, Spivak had acted "very evasive[ly]" when asked for evidence to support his argument that Law Offices of David L. Ross had an active partner admitted to practice in California—a request with which he did not, and apparently could not, comply. Pet. App. 27a. Still more troubling to the court was Spivak's pattern of misleading, contradictory, and false statements, his dilatory trial tactics, and his constant flouting of the court's rulings. As the court correctly noted, this pattern of misconduct helped exclude any possibility that Ross's and Spivak's failure to inform the court of the fact that Ross was not authorized to practice before it was the result of "innocent error." *Id.* at 31a.[8]

Furthermore, the court's denial of attorney's fees under the extraordinary facts of this case does not contravene Congress's intention that attorney's fees serve as an incentive for lawyers to bring civil rights lawsuits that, for want of a lawyer, might not otherwise be filed. In essence, the court denied fees because Ross, the counsel of record, simply was not entitled to file this case in the first place. Any disincentive effect

---

[8] Petitioner contends that "the district and circuit courts abused their discretion when they denied Petitioner's attorney's fees *in toto*, even as to the California licensed lawyers for work performed by them." Pet. 12. However, as the district court noted, Ross was the sole assignee of the right to attorney's fees pursuant to the Retainer Agreement signed by petitioner. Pet. App. 21a. Furthermore, "all the attorneys involved in plaintiff's trial were employed at the Law Offices of David L. Ross." *Id.* at 22a-23a. Finally, the district court found that Spivak, petitioner's lead trial counsel, aided and abetted Ross in his scheme to mislead the court regarding his status, in violation of Rule 1-300 of the Rules of Professional Conduct of the State Bar of California. *Id.* at 31a, 33a-34a.

caused by the denial of fees in such an instance will merely dissuade unlicensed lawyers from bringing cases in jurisdictions in which they are not allowed to practice. The denial of fees in this highly unusual situation will have no effect on duly licensed attorneys who file cases in jurisdictions where they are authorized to do so.[9]

3. a. Petitioner suggests two justifications for this Court's review of the court of appeals' decision, neither of which has substance. Petitioner suggests, first, that the decision "conflicts with established precedent of this Court." Pet. 6. Yet petitioner identifies no precedent of this Court, or of any other federal court, with which the court of appeals' decision may be said to "conflict." Instead, petitioner merely cites this Court's precedents establishing that prevailing Title VII plaintiffs *ordinarily* should receive fee awards in the absence of "special circumstances." Pet. 7. The district court here expressly adopted and applied this standard, and its finding that special circumstances were present here does not constitute an abuse of discretion. Petitioner identifies no precedent establishing that the fact that the assignee of the fee award was not authorized to practice before the court, yet misled the court into believing that he was, cannot be treated as a "special circumstance" justifying the denial of fees. In fact, it is well-established that an attorney's lack of authorization to practice before the relevant court generally divests an attorney of any right to collect fees from his or her client. See, *e.g.*, *Z.A.* v. *San Bruno Park Sch. Dist.*, 165

---

[9] Nor will the denial of fees in this case exert any disincentive effect on Title VII plaintiffs themselves, because the court of appeals directed the district court to specify that counsel could not seek to recover fees from petitioner. Pet. App. 6a.

F.3d 1273, 1275-1276 (9th Cir. 1999); *Birbrower, Montalbano, Condon & Frank, P.C.* v. *Superior Court*, 949 P.2d 1, 10 (Cal.), cert. denied, 525 U.S. 920 (1998).

Rather than identifying any precedent of this or any other Court establishing that a district court abuses its discretion by denying fees under circumstances similar to those presented here, petitioner merely proffers the unsupported assertion that the Law Offices of David L. Ross is a "national" (Pet. 3, 10, 11) or "interstate" (Pet. i, 3) law firm properly practicing law in California. But petitioner made the same assertion, similarly unsubstantiated, before the district court, and when the court requested supporting information petitioner provided none, switching instead to the theory that the Law Offices of David L. Ross was an "out-of-state" firm. Pet. App. 11a-12a, 26a-29a. Having failed to avail himself of the ample opportunities the district court afforded him to substantiate this assertion, petitioner cannot complain that the district court erred in failing to rely on it—particularly in light of petitioner's continued failure to substantiate this assertion.[10]

b. Second, petitioner suggests that this Court should grant certiorari for the purpose of "articulat[ing] the confines of what are 'special circumstances'" justifying the denial of fees to a successful Title VII plaintiff. Pet. 6. Petitioner alleges that the Court has fomented confusion among the lower courts by "creating an exception without the aid of definite criteria" to the

---

[10] Petitioner's claim that "the California Bar sanctioned and approved of this law firm structure" (Pet. 10 n.8) misses the point. The district court did not deny petitioner's fee request because it found fault with the "structure" of the Law Offices of David L. Ross, but rather due to Ross's participation in the case, his misrepresentations to the court, and his associates' assistance in supporting his misrepresentations.

presumption that prevailing Title VII plaintiffs are to be awarded attorney's fees. Pet. 8. However, petitioner identifies no conflicting cases in the lower courts, much less any case that awards attorney's fees to a lawyer who engaged in the pattern of deception evident in this case, and he does not even attempt to articulate what "definite criteria" this Court should set forth.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
MARLEIGH D. DOVER
DANIEL KAPLAN
Attorneys

APRIL 2001